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No. 06-9130

In the Supreme Court of the United States

ABDUS-SHAHID M.S. ALI, PETITIONER,

v.

FEDERAL BUREAU OF PRISONS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether a prisoner's claim under the Federal Tort Claims Act that prison guards mishandled his property during an inter-prison transfer is barred by 28 U.S.C. 2680(c), which precludes the government's liability in tort for "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer."

PARTIES TO THE PROCEEDINGS

Petitioner is Abdus-Shahid M.S. Ali.

Respondents are the Federal Bureau of Prisons (BOP); Harley Lappin (Director of the BOP), R. Wiley (Warden of United States Penitentiary in Atlanta (USP Atlanta)), Daniel Quinones (Inmate Systems Officer at USP Atlanta), and the United States.

R.E. Holt (Director of the Southeast Region of BOP) was originally named as a defendant in the district court but was removed in petitioner's amended complaint, was not an appellee in the court of appeals, and is not a respondent here.

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OPINIONS BELOW

The unreported opinion of the court of appeals (JA 57-62) is available at 204 Fed. Appx. 778. The unreported order of the district court (JA 41-56) is available at 2005 WL 1079299.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 2006. On January 17, 2007, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including March 8, 2007. The petition for a writ of certiorari was filed on January 25, 2007, and granted on May 29, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, are set forth in an appendix to this brief.

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, generally waives the United States' sovereign immunity for suits seeking damages "for injury or loss of property * * * caused by the negligent or wrongful act or omission" of employees of the federal government, 28 U.S.C. 1346(b), "in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. 2674. This "broad waiver of sovereign immunity" is cabined by thirteen exceptions set forth in 28 U.S.C. 2680.[1] *Smith v. United States*, 507 U.S. 197, 206-07 (1993). If one of the exceptions applies, the bar of sovereign immunity remains. The subsection at issue in this case is § 2680(c), which exempts from that waiver of immunity "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer."[2]

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[1] For example, there are exceptions for claims involving the mishandling of mail (§ 2680(b)), the imposition or establishment of a quarantine (§ 2680(f)), damages caused by the fiscal operations of the Treasury or by regulation of the monetary system (§ 2680(i)), the combatant activities of the military (§ 2680(j)), the activities of the Tennessee Valley Authority or the Panama Canal Company (§§ 2680(*l*) and (m)), and the activities of federal land banks (§ 2680(n)).

[2] Before Congress' enactment of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. No. 106-185, 114 Stat. 202, the exception provided that the FTCA does not apply to a claim arising out of the detention of "any goods or merchandise." 28 U.S.C. 2680(c) (1994). CAFRA struck from § 2680(c) the words "any goods or merchandise" and inserted "any goods, merchandise, or other property" in their stead. CAFRA § 3(a)(1), 114 Stat. at 211. CAFRA also added to

2. Petitioner is a prisoner in the custody of the United States Bureau of Prisons (BOP). Until recently, he was incarcerated at United States Penitentiary Big Sandy (USP Big Sandy) in Inez, Kentucky. He was transferred there on December 3, 2003, after spending twenty-eight months at United States Penitentiary Atlanta (USP Atlanta). JA 42.

Before being transferred, petitioner put his property in two duffel bags and brought them to USP Atlanta's Receiving and Discharge Unit (R&D Unit), where the property was to be inventoried, packaged, and sent to USP Big Sandy. See *BOP Program Statement No. 5800.12, Receiving and Discharge Manual*, ch. 4 (Dec. 31, 1997) <http://www.bop.gov/policy/progstat/5800_012.pdf>. Due to insufficient staffing at the R&D Unit, its officer in charge, respondent Daniel Quinones, told petitioner to leave his property with him at the R&D Unit and that he would "get to it in a day or so and ship everything to USP Big Sandy." JA 43. Petitioner complied. He closed and locked the two

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the end of § 2680(c) a provision which waives the United States' sovereign immunity for certain seizures of property made in connection with asset forfeiture laws. It specifically provides that the government's immunity *is* waived for:

> any claim-based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—
>
> (1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;
>
> (2) the interest of the claimant was not forfeited;
>
> (3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and
>
> (4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

CAFRA § 3(a)(3), 114 Stat. at 211.

duffle bags and left them in the R&D Unit with respondent Quinones. He was not present when his items finally were inventoried, packaged, and shipped to USP Big Sandy on or about December 8, 2003. *Ibid.*

When petitioner's duffle bags were returned to him at USP Big Sandy's R&D Unit, he noticed that several religious and personal items were missing and so informed the R&D staff.[3] Staff members told him "to sign for what he got because that was all that they had been sent." *Ibid.* Petitioner was also "informed that if some of his property was missing then he should file a Federal tor [sic] claim" and was given the standard Form 95 for property claims. *Ibid.* Petitioner did as he was told. He signed for his property and recorded the missing items. He also reviewed the inventory slip filled out by respondent Quinones at USP Atlanta and discovered that respondent Quinones had not inventoried the missing items. *Id.* at 43-44.

3. Petitioner filed an administrative tort claim with the BOP's Southeast Regional Office Director on December 30, 2003, to recover the value of his missing items.[4] *Id.* at 46.[5] On August 11, 2004, petitioner received a letter from the Southeast Regional Office, stating that his administrative tort claim was denied and advising him that if "dissatisfied" with the denial, he was "afforded six (6) months from the

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[3] The district court provided a specific list of items missing from petitioner's property. JA 44.

[4] Respondents concede that petitioner exhausted his FTCA administrative remedies. JA 52.

[5] See also 28 C.F.R. 543.31 ("You may file a [Federal Tort Claims Act claim with the BOP] if you are * * * the owner of * * * damaged or lost property."); *BOP Program Statement No. 1320.06, Federal Tort Claims Act* § 7(a) (Aug. 1, 2003) <http://www.bop.gov/policy/progstat/1320_006.pdf> ("A claim may be filed by an inmate.").

date of the mailing of [the denial] within which to bring suit in the appropriate United States District Court."[6] JA 40.

4. Consistent with the BOP's advisement that petitioner could bring suit, petitioner filed this action on October 12, 2004, alleging that respondents were liable under the FTCA for the value of his lost property.[7] *Id.* at 41, 47. Notwithstanding the BOP's invitation to file suit, respondents promptly moved to dismiss petitioner's FTCA claim on the basis that it "is barred by the doctrine of sovereign immunity." *Id.* at 49. The district court agreed and dismissed the claim with prejudice. It held that "the [Bureau of Prisons] and USP-Atlanta employees had detained [petitioner's] property within the meaning of 28 U.S.C. § 2680(c)." *Id.* at 50. Because petitioner's FTCA claim was "not authorized by the FTCA," the court reasoned, it was "barred by the doc-

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[6] This advisement is consistent with the BOP's relevant regulation and program statement. See 28 C.F.R. 543.32 ("If you are dissatisfied with the [BOP's] final agency action, you may file suit in an appropriate U.S. District Court as no further administrative action is available."); accord, *BOP Program Statement No. 1320.06, supra*, § 8(g).

[7] Petitioner also brought claims (which are not before this Court, see Pet. 6-7 n.5, 25-26; U.S. Cert. Br. 11-13 & n.7) alleging that respondents violated his rights under (1) the Religious Freedom Restoration Act of 1995, 42 U.S.C. 2000bb *et seq.*; (2) the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc *et seq.*; and (3) the First, Fourth, and Fifth Amendments to the United States Constitution. JA 41 & n.1, 48, 58. The district court dismissed these claims without prejudice on the basis that petitioner failed to exhaust his administrative remedies, as required by the Prison Litigation Reform Act, 42 U.S.C. 1997e(a). *Id.* at 51-55. The court of appeals vacated the dismissal of the claims and remanded them to the district court. *Id.* at 60-62. Following this Court's grant of certiorari, the district court "administratively closed" the proceedings on remand pending this Court's review of petitioner's FTCA claim. *Ali v. Bureau of Prisons*, No. 1:04-CV-2986-JFK (N.D. Ga. June 5, 2007) (order procedurally terminating case).

trine of sovereign immunity and must be dismissed for lack of subject matter jurisdiction." *Id.* at 50-51.

5. The court of appeals affirmed. *Id.* at 58-60. The court held that "the officers who handled [petitioner's] property fall within the [detention of goods] exception found in 28 U.S.C. § 2680(c)" and that the district court properly dismissed petitioner's FTCA claim "for want of subject matter jurisdiction." *Id.* at 60. In so holding, the court followed its prior decision in *Schlaebitz v. Department of Justice*, 924 F.2d 193, 195 (CA11 1991) (*per curiam*). *Ibid.* In that case, the court held that United States Marshals, who were allegedly negligent in releasing a parolee's luggage to a third party, were "law-enforcement officers" under § 2680(c) and that the United States was consequently immune. *Schlaebitz*, 924 F.2d at 195. The court expressly refused to "construe the phrase 'or any other law enforcement officer' as supplementing the tax and customs context of the exception," such that the exception would be limited to "other officials assisting the customs or tax collection." *Id.* at 194. Instead, the court found persuasive the holdings of other courts of appeals – holdings with which four other courts of appeals now disagree[8] – that the term "'other law enforcement officer' may include officers in other agencies performing their proper duties" that involve detaining, storing, or

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[8] Compare *Chapa v. Department of Justice*, 339 F.3d 388, 390 (CA5 2003) (*per curiam*); *Cheney v. United States*, 972 F.2d 247, 248 (CA8 1992) (*per curiam*); *Bramwell v. Bureau of Prisons*, 348 F.3d 804, 807 (CA9 2003), cert. denied, 543 U.S. 811 (2004); *Hatten v. White*, 275 F.3d 1208, 1210 (CA10 2002); JA 60; *Schlaebitz*, 924 F.2d at 195; and *Ysasi v. Rivkind*, 856 F.2d 1520, 1525 (CAFC 1988) (all holding that the exception applies to law enforcement officers acting in any capacity), with *Andrews v. United States*, 441 F.3d 220, 222-28 (CA4 2006); *Kurinsky v. United States*, 33 F.3d 594, 598 (CA6 1994), cert. denied, 514 U.S. 1082 (1995); *Dahler v. United States*, 473 F.3d 769, 771-72 (CA7 2007) (*per curiam*); and *Bazuaye v. United States*, 83 F.3d 482, 486 (CADC 1996) (all holding that the exception applies to only law enforcement officers acting in a customs or tax capacity).

handling a person's property even if there is no nexus to customs or tax enforcement. *Id.* at 194-95.

6. On May 29, 2007, this Court granted certiorari to resolve the conflict among the circuits. 127 S. Ct. 2875 (2007).

SUMMARY OF ARGUMENT

Section 2680(c)'s exception from FTCA liability of "[a]ny claim arising in respect of * * * the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer" does not bar petitioner's claim for the value of property lost by federal prison officials. A careful analysis of the exception's text, context, legislative history, and underlying purpose establishes that Congress did not intended the exception's detention of property clause to broadly bar claims against law enforcement officers, like federal prison officials, without a nexus to customs or tax enforcement.

I. The text of § 2680(c) does not bar claims arising from detentions outside the customs and tax contexts. Statutory language must be read in light of its surroundings to avoid giving it unintended breadth. Congress' focus on revenue collection in § 2680(c) is manifest. In addition to immunizing "the detention of goods" and "merchandise" "by any officer of customs or excise," it also immunizes "the assessment or collection of any tax or customs duty." The related *noscitur a sociis* and *ejusdem generis* canons account for that focus by acknowledging that § 2680(c)'s superficially broad phrase "any other law enforcement officer" must be "known by its companions" and "of the same sort" as "officer[s] of customs or excise." In other words, the canons compel the conclusion that Congress employed the term "any other law enforcement officer" in § 2680(c)'s detention clause to describe not law enforcement officers generally, but instead non-customs and non-tax officers acting in a revenue collection capacity. This narrow reading is also compelled by the rule against superfluities because an all-

inclusive reading of "any * * * law enforcement officer" would subsume and, therefore, render inoperative "officer[s] of customs or excise," both of which are indisputably law enforcement officers. Further reinforcing that § 2680(c)'s detention clause should not be read to preclude petitioner's claim is the fact that Congress knows how to define "law enforcement officer" broadly when it wants. Another FTCA exception, 28 U.S.C. 2680(h), defines "law enforcement officer" sufficiently broad to include federal prison officials, but Congress expressly prohibited § 2680(c) from being read *in pari materia* with it by making it applicable "for the purpose" of § 2680(h) only.

II. The legislative history of § 2680(c) confirms what the text shows. After years of failed tort claim bills, in 1931, the Department of Justice drafted a bill at Congress' request that, for the first time, contained § 2680(c)'s detention clause. The materials relied on by the Department in drafting the exception clearly establish that the Department did not intend to immunize detentions of property outside the customs or tax contexts. The Department used as its model a British bill that exempted claims for property torts "done by any officer of customs and excise acting as such." Although the FTCA was not enacted for another fifteen years, the Department's detention clause was reintroduced, debated repeatedly, and eventually enacted without change. No employee of the Department and, more importantly, no Member of Congress ever indicated that they understood § 2680(c) to be any broader than the British bill on which it was based.

III. The purpose for Congress' enactment of § 2680(c) likewise confirms that Congress intended the exception to exclude claims arising from detentions of property by only officers engaged in customs and tax activities. Congress enacted the FTCA to relieve itself of the burden of settling through private legislation hundreds of requests for compensation for the torts of federal employees each year. Where adequate alternative remedies already existed, how-

ever, Congress faced no such burden. Since long before the FTCA's enactment, the common law recognized suits against individual customs and tax officers for the negligent performance of their duties. Congress was undoubtedly aware of that preexisting remedy when it enacted the FTCA because it had for decades provided indemnification for such suits. Accordingly, the Court has repeatedly suggested, and the legislative history of the FTCA confirms, that § 2680(c) was enacted to avoid the creation of a duplicative remedy. No similar common law remedy existed against (and no congressional indemnification was provided for) general law enforcement officers. Any construction of § 2680(c) that expands its reach beyond the customs and tax contexts would, therefore, be inconsistent with Congress' stated desire to avoid creation of a duplicative remedy because, with respect to property torts committed by general law enforcement officers, there would have been *no* remedy and no relief from the burden of requests for private legislation.

IV. Finally, although Congress amended § 2680(c) in 2000, those amendments are irrelevant to this case. The 2000 amendments added a new clause to § 2680(c) and created an "exception to the exception" by waiving the United States' sovereign immunity for a subset of previously barred property claims arising in connection with asset forfeitures. The language added to the statute through this amendment has no application to petitioner because the detention of his property had nothing to do with forfeiture proceedings. The viability of petitioner's claim instead turns on whether § 2680(c)'s detention of property clause, which is original to the FTCA's 1946 enactment, was intended to preclude government liability for the property torts of law enforcement officers acting outside the customs or tax capacities. The text, context, legislative history, and purpose behind § 2680(c) all establish that it was not so intended.

ARGUMENT

SECTION 2680(C) OF THE FEDERAL TORT CLAIMS ACT DOES NOT EXEMPT THE UNITED STATES FROM LIABILITY FOR THE LOSS OF OR DAMAGE TO PRISONER PROPERTY BY FEDERAL PRISON OFFICIALS

Section 2680(c) exempts from the Federal Tort Claims Act's waiver of the United States' sovereign immunity "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer." 28 U.S.C. 2680(c). There is no dispute that it precludes FTCA suits to recover money damages from the United States for the loss of or damage to property detained by customs officers, tax officers, or other federal law enforcement officers acting in a customs or tax capacity. This case turns on whether the exception's use of the phrase "any other law enforcement officer" bars claims for the loss of or damage to property by federal law enforcement officers acting outside the customs and tax contexts.[9] Although the Court expressly left that

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[9] Petitioner has not sought review in this Court of the court of appeals' determination (JA 59-60) that his claim involves the "detention" of property, within the meaning of § 2680(c) and as interpreted by this Court in *Kosak v. United States*, 465 U.S. 848, 852 n.6 (1984) (interpreting § 2680(c) to apply both to claims for damage to property caused by a detention itself and to claims for damage caused by the "negligent handling or storage" of property). Although the scope of the word "detention" has not received the same amount of attention as the meaning of the phrase "any other law enforcement officer," it remains open to debate. Indeed, it would appear that at least the Second and Sixth Circuits would find, under the facts of this case, that there was no "detention" within the meaning of § 2680(c). See *Formula One Motors, Ltd. v. United States*, 777 F.2d 822, 823 (CA2 1985) (observing that a "detention" within the meaning of Section 2680(c) is a "physical seizure preliminary to search"); *Kurinsky v. United States*, 33 F.3d 594, 597 (CA6 1994) (describing "detention" within the meaning of § 2680(c) as a "temporary custody * * * often associated with an

very question open in *Kosak*, 465 U.S. at 852 n.6, its framework for construing the § 2680 exceptions establishes that the question must be answered in the negative and that the court of appeals' contrary holding must be reversed.

"The starting point of [the Court's] analysis * * * must, of course, be the language of § 2680(c)." *Id.* at 853. "'[I]n expounding * * * statute[s],'" however, the Court will "not [be] guided by a single sentence or member of a sentence, but [will] look to the provisions of the whole law, and to its object and policy.'" *Dole v. United Steelworkers*, 494 U.S. 26, 35 (1990) (quoting *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989)). The FTCA is treated no differently, notwithstanding that it is a waiver of the United States' sovereign immunity.[10] Accordingly, the Court's construction of

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ongoing investigation"), cert. denied, 514 U.S. 1082 (1995). Because the proper construction of "detention" is not at issue in this case but remains otherwise subject to debate, the Court should expressly reserve opinion on that issue whatever the disposition of this case. See, *e.g.*, *McRary v. New York*, 461 U.S. 961, 962-63 (1983) (Stevens, J., respecting denial of certiorari) ("[I]t is a sound exercise of discretion for the Court to allow" an issue to "receive[] further study" in other courts "before it is addressed by this Court.").

[10] That is because, as the Court reiterated just two Terms ago,

> the general rule that "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign" * * * is unhelpful in the FTCA context, where "unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute," which "waives the Government's immunity from suit in sweeping language."

Dolan v. Postal Serv., 126 S. Ct. 1252, 1260 (2006) (quoting *Lane v. Peña*, 518 U.S. 187, 192 (1996); *Kosak*, 465 U.S. at 853 n.9; *United States v. Yellow Cab Co.*, 340 U.S. 543, 547 (1951)); see also *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992) ("We have on occasion narrowly construed *exceptions* to waivers of sovereign immunity where that was consistent with Congress' clear intent, as in the context of the sweeping language of the FTCA." (emphasis added)); *Block v. Neal*, 460 U.S. 289, 298 (1983) ("The exemption of the sovereign

the § 2680 exceptions has depended not on consideration of the disputed language "in isolation," but instead on a "reading of the whole statutory text," consideration of "the purposes and context of the statute," *Dolan*, 126 S. Ct. at 1257 (construing § 2680(b)), and consultation of the statute's legislative history, see, *e.g.*, *Kosak*, 465 U.S. at 855-61 (construing § 2680(c)).

Application of that framework – that is, a close analysis of § 2680(c)'s text, context, legislative history, and underlying purpose – clearly establishes that Congress intended § 2680(c) to bar tort claims for the loss of or damage to property by customs and tax officers and "any other law enforcement officer" acting in a customs or tax capacity but not officers (such as federal prison officials) acting in a general law enforcement capacity.

I. THE TEXT OF § 2680(C) DOES NOT BAR CLAIMS ARISING FROM DETENTIONS OUTSIDE THE CUSTOMS AND TAX CONTEXTS

It is "fundamental * * * that the words of a statute must be read in their context." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). Section 2680(c)'s "any other law enforcement officer" phrase does not stand alone. It is surrounded by language specific to the activities of customs and tax officers. A proper interpretation of the phrase must, therefore, take into consideration the provision's customs- and tax-focused surroundings. *United States v. Morton*, 467

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from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.").

As a result, the Court's "proper objective" in construing one of the § 2680 exceptions "is to identify those circumstances which are within the words and reason of the exception – no less" but, just as importantly, "no more." *Dolan*, 126 S. Ct. at 1260 (internal quotations omitted); see also *Kosak*, 465 U.S. at 853 n.9; *Dalehite v. United States*, 346 U.S. 15, 31 (1953).

U.S. 822, 828 & n.8 (1984) (explaining that the Court "do[es] not * * * construe statutory phrases in isolation" but instead "in light of" their surroundings).

Among the Court's tools for conducting such a holistic analysis are the *ejusdem generis* and *noscitur sociis* canons, which are "particularly applicable" here. *Andrews v. United States*, 441 F.3d 220, 223 (CA4 2006) (applying canons to § 2680(c)). Their application to § 2680(c)'s customs- and tax-focused language not only establishes that Congress intended § 2680(c) to apply to only customs officers, tax officers, and "other law enforcement officer[s]" carrying out customs- or tax-related functions, but also gives the statute its most coherent reading and renders none of the statute inoperative.

1. The *esjudem generis* canon, which means "of the same sort,"

> stands for the proposition that when a text lists a series of items, a general term included in the list should be understood to be limited to items of the same sort. For instance, if someone speaks of using "tacks, staples, screws, nails, rivets, and other things," the general term "other things" surely refers to other fasteners.

Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 26 (1997); see also *Bazuaye v. United States*, 83 F.3d 482, 484 (CADC 1996) ("[I]f a statute lists 'fishing rods, nets, hooks, bobbers, sinkers and other fishing equipment,' 'other equipment' might mean plastic worms and fishing line, but not snow shovels or baseball bats." (quoting *United States v. Aguilar*, 515 U.S. 593, 615 (1995) (Scalia, J., dissenting)); *Black's Law Dictionary* 556 (8th ed. 2004).

The Court's recent decision in *Washington State Department of Social & Health Services v. Guardianship Estate of Keffeler*, 537 U.S. 371 (2003), is instructive. The statute at issue in that case precluded certain Social Security benefits from being recovered through "execution, levy, at

tachment, garnishment, *or other legal process*." 42 U.S.C. 407(a) (emphasis added). The question before the Court was whether "other legal process" covered the State of Washington's method of recovery – namely, reimbursing itself with funds already in its possession but held in trust for the beneficiaries – that was not similar to execution, levy, attachment, or garnishment, but nevertheless fit superficially into the broad category of "other legal process[es]." *Keffeler*, 537 U.S. at 382.

The Court acknowledged that the phrase "other legal process" is sufficiently broad "in the abstract" so as to render the State's method of recovery a "legal process." *Id.* at 384. But relying on *ejusdem generis*, the Court held that § 407(a) "uses the term 'other legal process' far more restrictively." *Ibid.* According to the Court, the statute encompassed only "other legal process[es]" that were "similar in nature to" or "much like the processes of execution, levy, attachment, and garnishment." *Id.* at 384-85. Those specifically enumerated methods of recovery all "require[d] utilization of some judicial or quasi-judicial mechanism * * * by which control over property passes from one person to another." *Id.* at 385. Because the State's method of reimbursing itself with funds already in its possession did not, the Court held that the "legal process" employed by the State did not fall within § 407(a)'s "other legal process" phrase. *Ibid.*

The Court reaffirmed the continuing applicability of *ejusdem generis* (though not referring to it by name) to a disjunctive list of similarly narrow terms followed by a general term just two Terms ago, when it construed another FTCA exception in *Dolan*, *supra*. The exception at issue in that case preserved the United States' sovereign immunity for "[a]ny claim arising out of the loss, miscarriage, *or negligent transmission* of letters or postal matter." 28 U.S.C. 2680(b) (emphasis added). The question before the Court was whether slip-and-fall injuries resulting from a negligently placed parcel arose out of the "negligent transmis-

sion" of the parcel. *Dolan*, 126 S. Ct. at 1256-57. Despite the broad sweep of "negligent transmission" when considered "in isolation," the Court looked to the phrase's two preceding terms: "loss" and "miscarriage." *Id.* at 1257. "Those terms," the Court held, "limit[ed] the reach of 'transmission'" to failures "to deliver mail in a timely manner to the right address" and, therefore, required that the exception not bar the plaintiff's claim. *Ibid.*

Section 2680(c), like the statute at issue in *Keffeler* and § 2680(b) in *Dolan*, "presents a textbook *ejusdem generis* scenario." *Andrews*, 441 F.3d at 224; see also *Ortloff v. United States*, 335 F.3d 652, 658-59 (CA7 2003) (applying canon to § 2680(c)), cert. denied, 540 U.S. 1225 (2004); *Bazuaye*, 83 F.3d at 484 (same); *Kurinsky*, 33 F.3d at 596-97 (same). Despite the broad sweep of "any other law enforcement officer" in the abstract, § 2680(c) "uses the term * * * far more restrictively." *Keffeler*, 537 U.S. at 384. "It contains a general phrase – 'any other law enforcement officer' – that follows a recitation of specific things – 'any officer of customs or excise' – whose similar characteristic is that they are charged with the function of enforcing the revenue laws (customs and tax, respectively) of the United States." *Andrews*, 441 F.3d at 224. A faithful application of the *ejusdem generis* canon, therefore, dictates that an agent of the Drug Enforcement Agency (DEA) who "seized and searched an automobile that had been shipped from abroad and was still in its shipping container" would fall within the scope of the phrase "any other law enforcement officer" as used in § 2680(c) because he is performing a function similar to an "officer of customs or excise." *E.g.*, *Formula One*, 777 F.2d at 824. But a Bureau of Prisons (BOP) officer handling petitioner's property would not fall within the scope of the phrase "any other law enforcement officer" because he is not performing such a function.

2. The related canon, *noscitur a sociis*, literally means "it is known by its companions." Scalia, *supra*, at 26. It

> stands for the principle that a word is given meaning by those around it. If you tell me, "I took the boat out on the bay," I understand "bay" to mean one thing; if you tell me "I put the saddle on the bay," I understand it to mean something else.

Ibid.; see also *Black's Law Dictionary, supra*, at 1087. Its primary function, as the Court has explained, is "to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).

Jarecki is illustrative. In that case, the Court was asked to decide whether income from the sales of certain new products was income resulting from "discovery" under a tax deferral provision applicable to "income resulting from exploration, discovery, or prospecting." 26 U.S.C. 456(a)(2)(B) (1952). Applying *noscitur a sociis*, the Court concluded that the statute did not apply to the "discovery" of a new product. *Jarecki*, 367 U.S. at 307. According to the Court, the statute's use of the word "discovery" "gather[ed] meaning from the words around it." *Ibid.* The fact that the rest of the statute's words "all describe income-producing activity in the oil and gas and mining industries," the Court reasoned, "strongly suggest[s] that a precise and narrow application was intended." *Ibid.*

The Court similarly applied *noscitur a sociis* in *Gutierrez v. Ada*, 528 U.S. 250 (2000), to a provision in the Guam Organic Act that mandated a runoff election for Governor and Lieutenant Governor "[i]f no candidates receive a majority of the votes cast in any election," 48 U.S.C. 1422. The Court found that the context surrounding the phrase "in any election," though superficially appearing to apply to all elections, was actually intended to refer to only gubernatorial elections. *Gutierrez*, 528 U.S. at 254-58. "[T]he key to understanding the phrase," the Court explained, is that "the reference to 'any election' is preceded by two references to gubernatorial election and followed by four." *Id.* at 254-55. Thus, continued the Court, "with 'any election' so surrounded, what could it refer to except an election for Gover-

nor and Lieutenant Governor, the subject of such relentless repetition?" *Ibid.*

Section 2680(c) is replete with evidence that Congress intended the phrase "any other law enforcement officer" to apply more narrowly than might appear from reading the phrase in isolation. Its first two clauses "dwell exclusively on customs and taxes." *A-Mark, Inc. v. Secret Service*, 593 F.2d 849, 851 (CA9 1978) (Tang, J., concurring). The first "refers solely to claims arising from the specific actions of assessing or collecting a tax or customs duty," while the second refers to the detention of property by officials "whose job is to enforce the tax and customs laws." *Andrews*, 441 F.3d at 224-25. The fact that both of these clauses "have a clear and defined meaning limited to the enforcement of the tax and customs laws confirms that Congress did not 'shift its attention' outside of the tax and customs context when it added the unqualified 'any other law enforcement officer.'" *Id.* at 225. To read that phrase otherwise would be illogical and give it the very unintended breadth that the *ejusdem generis* and *noscitur a sociis* canons seek to avoid.

3. Another compelling reason to find § 2680(c) inapplicable to this case is the rule against superfluities, which "complements the principle that courts are to interpret the words of a statute in context" and requires courts to construe statutes "so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (citing 2A Norman J. Singer, *Statutes and Statutory Construction*, § 46.06, at 194 (6th ed. 2000)).

Section 2680(c) precludes damage suits "arising in respect of * * * the detention of any goods, merchandise, or other property *by any officer of customs or excise or any other law enforcement officer*." (Emphasis added.) A broad interpretation of "any other law enforcement officer" to include all officers regardless of capacity would render the preceding phrases "any officer of customs or excise" superfluous. Customs and tax officers, who are indisputably law

enforcement officers,[11] would be subsumed by the broader category of "other law enforcement officer[s]." See *Ortloff*, 335 F.3d at 659; *Bazuaye*, 83 F.3d at 484. If Congress had actually intended that phrase to include any law enforcement officer regardless of capacity, the provision could have simply read "detention * * * by any law enforcement officer" and meant precisely the same thing.

Congress should not be presumed to have included language that has no operative effect. The phrase "any officer of customs or excise or any other law enforcement officer" should be read to give effect to all of its terms. This can be done only by recognizing Congress' awareness that officers other than customs or tax officers are at times in situations in which they are executing customs or tax laws, or otherwise acting in a customs or tax capacity. See, *e.g.*, *Formula One*, 777 F.2d at 823 (holding that the conduct of DEA agents who "seized and searched an automobile that had been shipped from abroad and was still in its shipping container" fell within the scope of § 2680(c)). This reading gives an entirely sensible meaning to all of the terms used in § 2680(c) and does not render superfluous any of the language selected by Congress.[12]

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[11] See 19 U.S.C. 1589a (authorizing customs officers to carry a firearm, execute any warrant, subpoena or summons, make an arrest without a warrant upon reasonable grounds, and perform "any other law enforcement duty" authorized by the Secretary of the Treasury); 26 U.S.C. 7608 (establishing substantially same duties for internal revenue officers "charged with enforcing the criminal, seizure, or forfeiture provisions" of the tax code).

[12] In *Ysasi v. Rivkind*, the Federal Circuit asserted that the interpretation advanced by petitioner here "would render the phrase 'or any other law enforcement officer' surplusage." 856 F.2d 1520, 1524 (CAFC 1988). How this is so is unclear. Petitioner concedes that § 2680(c) preserves sovereign immunity for the property torts of federal law enforcement officers who are neither customs not tax officers but are nonetheless involved in functions "sufficiently akin to the functions carried out by Customs [or tax] officials." *Formula One*, 777

4. None of the courts of appeals adopting a broad reading of § 2680(c)'s "any other law enforcement officer" phrase has attempted to apply interpretive canons – much less, considered the phrase's context. Indeed, most have "merely conclusorily stated * * * without any analysis," *Ortloff*, 335 F.3d at 659,[13] that the "plain language" of the phrase "any other law enforcement officer" in § 2680(c) requires a broad reading. See *Halverson v. United States*, 972 F.2d 654, 656 (CA5 1992) (*per curiam*) ("We find persuasive * * * the plain language of § 2680(c) that exempts '[a]ny claim arising in respect of * * * the detention of any goods or merchandise by * * * any other law enforcement officer.'"); *Ysasi*, 856 F.2d at 1524 ("[T]he government's broad reading of [§ 2680(c)] comports with * * * the plain language of the statute."); see also, *e.g.*, *Schlaebitz*, 924 F.2d at 194-95

F.2d at 824. To this end, petitioner does not quibble with *Formula One*, in which the Second Circuit found that the conduct of DEA agents who "seized and searched an automobile that had been shipped from abroad and was still in its shipping container" fell within the scope of § 2680(c). *Ibid.*; see also *Mid-South Holding Co. v. United States*, 225 F.3d 1201, 1205-06 & n.6 (CA11 2000) (describing how the Coast Guard's law enforcement authority is analogous to that of the Customs Service). Instead, petitioner's issue is with the refusal of the court of appeals below to "construe the phrase 'or any other law enforcement officer' as supplementing the tax and customs context of the exception," such that the exception would be limited to "other officials assisting the customs or tax collection." *Schlaebitz v. Department of Justice*, 924 F.2d 193, 194 (CA11 1991) (*per curiam*).

[13] See also *Andrews*, 441 F.3d at 228 (criticizing courts of appeals adopting broad reading of § 2680(c) for lack of meaningful analysis); *Kurinsky*, 33 F.3d at 598 ("[O]ther appellate courts that have addressed this issue have found that the phrase 'other law enforcement officer' includes all types of officers, whatever their duties, [but] those cases have not articulated a clear reason for this holding, and have often stated their conclusions with little or no analysis."); *Formula One*, 777 F.2d at 823 ("[S]everal circuits have ruled, with scant discussion, that section 2680(c) applies to detentions beyond the context of customs duties and taxes.").

(summarily following *Ysasi* to hold that § 2680(c) "specifically exempts any claim based on the detention of goods by law enforcement officers in the performance of their lawful duties"). By failing to consider the context surrounding § 2680(c)'s "any other law enforcement officer" phrase, those courts have critically misapplied (what they described as) "plain language" analysis.

The search for "plainness" requires not only "reference to the language itself," but also consideration of "the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (describing how courts determine "[t]he plainness or ambiguity of statutory language"). In other words, a court's search for plainness requires the very context-based reading advanced by petitioner (pages 12-18, *supra*) and that has led all four courts of appeals that have performed it to construe § 2680(c)'s "any other law enforcement officer" phrase narrowly. See *Andrews*, 441 F.3d at 223-25; *Ortloff*, 335 F.3d at 658-60; *Bazuaye*, 83 F.3d at 484; *Kurinsky*, 33 F.3d at 596-97.

The few courts of appeals that have attempted to justify their holdings that § 2680(c) includes officers acting in general law enforcement capacities with more than just conclusory assertions have done so by reading § 2680(c) in light of 28 U.S.C. 2680(h). See *Bramwell v. Bureau of Prisons*, 348 F.3d 804, 807 (CA9 2003), cert. denied, 543 U.S. 811 (2004); *Chapa v. Department of Justice*, 339 F.3d 388, 390 (CA5 2003) (*per curiam*).[14] That provision defines an "investiga-

[14] These courts were also "persuaded by the fact that BOP officers are considered 'law enforcement officers' under several other statutes." *Bramwell*, 348 F.3d at 807 (citing *Chapa*, 339 F.3d at 390, and collecting examples). Petitioner does not dispute that, as a general matter, BOP officers are "law enforcement officers." Nor does petitioner dispute that BOP officers are "law enforcement officers" under § 2680(h). Indeed, the Court in *Carlson v. Green*, 446 U.S. 14, 17, 20 (1980), held as much when it found that a victim of unlawful

tive or law enforcement officer" broadly to include "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law."[15] Under the *in pari materia* canon, "a term appearing in several places in a statutory text is generally read the same way each time it appears." *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994); see also *Black's Law Dictionary*, *supra*, at 807 (noting that, under the *in pari materia* or "in the same matter" canon, statutes "may be construed together, so that inconsistencies in one statute may

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conduct by BOP officials would have a cause of action against the government under § 2680(h). The question before the Court in this case, however, is not whether BOP officers are "law enforcement officers" in a general sense or under § 2680(h) but instead whether they are the type of "other law enforcement officer" whose conduct Congress sought to immunize through § 2680(c).

The Fifth Circuit in *Chapa* additionally relied on the principle that a waiver of the Government's sovereign immunity should be strictly construed in favor of the sovereign. See 339 F.3d at 390. As already explained, the Court has repeatedly rejected the applicability of that irterpretive principle to the § 2680 exceptions. See note 10, *supra*.

[15] Section 2680(h) exempts from the FTCA's waiver of sovereign immunity:

> Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

be resolved by looking at another statute on the same subject"). Those courts' reliance on the *in pari materia* canon, however, was misplaced.

The canon "readily yields" when there is evidence that the words at issue "were employed in different parts of the act with different intent." *General Dynamics Land Sys. v. Cline*, 540 U.S. 581, 595 (2004) (quoting *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433-34 (1932)). In other words, "[w]here the subject-matter to which the words refer is not the same in the several places where they are used, or the conditions are different * * * the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed." *Atlantic Cleaners*, 286 U.S. at 433-34 (noting that "[i]t is not unusual for the same word to be used with different meanings in the same act" and according different interpretations to the same phrase in different sections of the same act) (citations omitted); accord, *Helvering v. Stockholm Enskilda Bank*, 293 U.S. 84, 87-88 (1932). Here, an examination of the context and history of § 2680(c) and § 2680(h) reveals that the conditions under which their respective "law enforcement officer" provisions were enacted and their intended subject matters differ substantially.

Congress' intent that § 2680(h)'s definition of "law enforcement officer" not apply outside that subsection is explicit in the provision's text. By its own terms, § 2680(h)'s definition of "law enforcement officer" is limited "for the purpose of this subsection." See also *Andrews*, 441 F.3d at 226 ("Congress expressly limited [§ 2680(h)'s] definition of 'investigative or law enforcement officer'" to that subsection alone).[16] Moreover, Congress knows how to override

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[16] The courts of appeals repeatedly refuse to apply the *in pari materia* canon to define a term in one provision when Congress expressly limited the definition to another. See, *e.g.*, *In re Princo Corp.*,

§ 2680(h)'s limitation when it wants to do so.[17] See 19 U.S.C. 1630(a) (expressly incorporating by cross-reference § 2680(h)'s definition); 31 U.S.C. 3724(a) (same). Under such circumstances, the rule against superfluities requires that § 2680(h)'s limitation be enforced and that its definition of "law enforcement officer" not be ascribed to § 2680(c). "To apply the § 2680(h) definition beyond that subsection," as the Fourth Circuit observed, "would make meaningless the limitation that Congress placed on the definition." *Andrews*, 441 F.3d at 226.[18] Indeed, it is likely for this reason that the

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486 F.3d 1365, 1368 (CAFC 2007) (holding that where the definitional provision of 19 U.S.C. 1337 "limits the definition of 'becomes final' to subsections (j)(3) and (c)," the definition cannot be applied to a related civil statute); *United States v. Nason*, 269 F.3d 10, 17 (CA1 2001) ("[W]hen Congress inserts limiting language [or, in this case expansive language] in one section of a statute but adjures that language in another, closely related section, the usual presumption is that Congress acted deliberately and purposefully in the disparate omission."); *United States v. Amada*, 200 F.3d 647, 650-51 (CA9 2000) (holding that where the definition of "lottery" is "expressly limited to [18 U.S.C.] § 1307(b)," the definition cannot be applied to a related civil statute).

[17] As will be explained in greater detail (note 42, *infra*), Congress affirmatively declined to incorporate § 2680(h)'s definition into § 2680(c) when it rejected H.R. 1745, 105th Cong., 1st Sess. § 106 (1997), which contained language doing so.

[18] The fact that § 2680(h) defines "law enforcement officer" broadly and goes so far as to state expressly that the broad definition applies to only § 2680(h) not only eliminates any suggestion that subsections (c) and (h) should be read as parallel but strongly suggests the opposite. "'[W]hen the legislature uses certain language in one part of the statute and different language in another, the Court assumes different meanings were intended.'" *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 n.9 (2004) (quoting 2A Singer, *supra*, § 46:06, at 194); see also *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994) ("[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." (quoting *City of Chicago v. Environmental Def. Fund*, 511 U.S. 328, 338 (1994))). Because the class of law enforcement officers defined in § 2680(h) is all-encompassing, Congress' express

leading treatise on statutory construction warns that "a definition which relates specifically to a term as used in a single article of a code cannot be used *in pari materia* with other articles." 2B Singer, *supra*, § 51:3.

Additionally, the "law enforcement officer" provisions of subsections (c) and (h) were enacted at different times and for different purposes.[19] The phrase "any other law enforcement officer" in § 2680(c) is original to the FTCA's 1946 enactment and relates to property loss. The second clause of § 2680(h), including the definition of "law enforcement officer," was added to the FTCA nearly thirty years later in 1974 for reasons that have nothing to with property loss but instead relate to physical harms to individuals.[20] In light of

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limitation on that definition's application must mean that Congress intended the class of law enforcement officers referenced in § 2680(c) to be narrower – *viz.*, law enforcement officers acting in a customs or tax capacity.

[19] Had the two subsections been enacted at the same time, the *in pari materia* canon might have greater force. See *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972) (observing that application of the *in pari materia* canon "makes the most sense when the statutes were enacted by the same legislative body at the same time").

[20] The legislative history of the 1974 amendment to § 2680(h) demonstrates that it was designed to address physical harm resulting from abuses by federal law enforcement officers of the federal "no-knock" statute and to provide a remedy against the government for the same type of conduct that serves as the basis for claims under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). See S. Rep. No. 588, 93d Cong., 1st Sess. 2-3 (1973). Indeed, as the Ninth Circuit observed, "[t]he substance of the amendment was portrayed as concerned primarily with the search and seizure issue with no discussion of the effect of the amendment on the whole of the FTCA." *Wright v. United States*, 719 F.2d 1032, 1036 n.2 (CA9 1983); see also *Sutton v. United States*, 819 F.2d 1289, 1295-97 (CA5 1982) (discussing the legislative history of the 1974 amendment to § 2680(h)); Jack Boger *et al.*, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis*, 54 N.C.L. Rev. 497, 500-16 (1976) (same).

this strong evidence that the phrase "law enforcement officer" was "employed in different parts of the act with different intent," the *in pari materia* presumption must "yield," *General Dynamics*, 540 U.S. at 595, to the meaning of § 2680(c) that the provision's textual context, legislative history, and underlying purpose dictate.

II. THE LEGISLATIVE HISTORY OF § 2680(C) CONFIRMS THAT CONGRESS DID NOT INTEND TO BAR CLAIMS ARISING FROM DETENTIONS OF PROPERTY OUTSIDE THE CUSTOMS AND TAX CONTEXTS

The legislative history of § 2680(c) confirms that Congress intended the exception to exclude claims arising from detentions of property by only officers engaged in customs and tax activities. Section 2680(c)'s detention clause was drafted by the Department of Justice at Congress' request and enacted without change. Nothing in the legislative record or in the Department's underlying materials indicates that Congress intended to preclude government liability for property torts committed by law enforcement officers acting outside the customs and tax contexts.

1. The FTCA was enacted as title IV of the Legislative Reorganization Act of 1946 (LRA), Pub. L. No. 79-601, 60 Stat. 812, 842-47. The legislative history of that bill, S. 2177, 79th Cong., 2d Sess. (1946) (enacted), focuses on the internal reorganization of congressional operations, not the FTCA provisions. Consequently, the Court's review of the FTCA's legislative history repeatedly has extended back to prior stand-alone tort claim bills considered by Congress over the two decades preceding the FTCA's enactment. See, *e.g.*, *Sosa*, 542 U.S. at 707; *United States v. Shearer*, 473 U.S. 52, 55 (1985); *United States v. S.A. Empresa De Viacao Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808-10 (1984); *Kosak*, 465 U.S. at 855-61; *Dalehite*, 346 U.S. at 26-30. Such a review is particularly appropriate here because the text of § 2680(c)'s detention of property clause was first considered by Congress fifteen years before the FTCA's passage and

carried forward without change through numerous subsequent tort claim bills until it was finally enacted.

2. From 1926 to 1931, eleven federal tort claim bills were proposed in, considered by, and ultimately rejected by Congress. At least eight of those eleven bills contained an exception for "any claim arising in respect of the assessment or collection of any tax or customs duty."[21] In 1931, Representative Collins introduced a bill, which for the first time in the FTCA's drafting history, expanded on earlier bills' customs and tax exception by also exempting claims "arising in respect of * * * the detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer." H.R. 5065, 72d Cong., 1st Sess. § 206(2) (1931). This bill was drafted at Representative Collins' request by the Department of Justice and the General Accounting Office of the Comptroller General. See *A General Tort Bill: Hearing on H.R. 5065 Before A Subcomm. of the H. Claims Comm.*, 72d Cong., 1st Sess. 7, 22 (1932) [hereinafter "1932 Hearing"] (statements of Rep. Collins and Col. O.R. McGuire, Counsel to the Comptroller General); H.R. Rep. No. 1287, 79th Cong., 1st Sess. 7 (1945) (letter dated Feb. 14, 1940 from Robert H. Jackson, Att'y Gen.); Brief for

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[21] Compare H.R. 6716, 69th Cong., 1st Sess. § 8(a)(2) (1926); H.R. 8651, 69th Cong., 1st Sess. § 8(a)(2) (1926); S. 1912, 69th Cong., 1st Sess. § 8(a)(2) (as reported by H. Claims Comm., Mar. 26, 1926); H.R. 9285, 70th Cong., 1st Sess. § 8(a)(2) (1928); S. 4377, 71st Cong., 2d Sess. § 4(a)(2) (1930); H.R. 15428, 71st Cong., 3d Sess. § 4(a)(2) (1930); H.R. 16429, 71st Cong., 2d Sess. § 3(2) (1931); and H.R. 17168, 71st Cong., 3d Sess. § 3(a)(2) (1931), with H.R. 12178, 68th Cong., 2d Sess. (1925); H.R. 12179, 68th Cong., 2d Sess. (1925); H.R. 8914, 69th Cong., 1st Sess. (1926).

For explanations of the varying reasons why these bills were never enacted, see, *e.g.*, 1 Lester S. Jayson & Robert C. Longstreth, *Handling Federal Tort Claims* § 2.09, at 2-51 to 2-63 (2007) (detailing the nature of tort claim proposals considered by Congress between 1925 and 1946); Note, *The Federal Tort Claims Act*, 56 Yale L. J. 534, 535-36 n.10 (1947) [hereinafter "Yale L.J. Note"] (same).

the United States in *Kosak v. United States*, O.T. 1983, No. 82-618, at 19 [hereinafter "U.S. *Kosak* Br."].

Because of "the absence of any direct evidence regarding how members of Congress understood the provision that became § 2680(c)," the Court has instead looked to and considered "significant" "the views of [the exception's] draftsman" and whether he believed that what is now § 2680(c) "would bar" a particular suit. *Kosak*, 465 U.S. at 856-57 n.13.[22] That individual was "almost certainly" Alexander Holtzoff, then a Special Assistant to the Attorney General (and later a District Judge), and "one of the major figures in the development of the Tort Claims Act."[23] *Id.* at 856. The

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[22] *Kosak* is, of course, not the only case in which the Court has relied on a pre-enactment statement of purpose from the Department of Justice. See, *e.g.*, *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 351-52 (1977) (relying on "[a] Justice Department statement concerning Title VII * * * made before § 703(h) was added to Title VII" because it is an "authoritative indicator[] of that section's purpose").

[23] Following Representative Collins' request that the Department of Justice and General Accounting Office draft a tort claim bill, Attorney General William DeWitt Mitchell assigned Judge Holtzoff "'to the special task of co-ordinating [sic] the views of the Government departments' regarding the proper scope of a tort claims statute." *Kosak*, 465 U.S. at 857 n.13 (quoting Edwin M. Borchard, *The Federal Tort Claims Bill*, 1 U. Chi. L. Rev. 1, 1 n.2 (1933)). "[A]fter a conference with every department and independent establishment in Washington," 1932 Hearing, *supra*, at 17 (testimony of Asst. Atty. Gen. Charles B. Rugg), and after requesting "pertinent data [and] suggest[ions as to] what tort claims should or should not be enforcible, [sic] against the United States," Alexander Holtzoff, *Report on Proposed Federal Tort Claims Bill* 16 (1931) [hereinafter "Holtzoff Report"], Judge Holtzoff drafted a tort claim bill and accompanying explanatory report and submitted them to Assistant Attorney General Charles B. Rugg, see *Kosak*, 465 U.S. at 857 n.13. Assistant Attorney General Rugg in turn "transmitted [them] to the General Accounting Office." *Ibid.* Although there is no notation that Judge Holtzoff's bill and report were "introduced into the public record," "it is likely" that

"detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer" language that Representative Collins first introduced (and that Congress eventually enacted fifteen years) later mirrors *precisely* what Judge Holtzoff proposed in his draft tort claim bill. Compare H.R. 5065, *supra*, § 206(2), and LRA § 421(c), 60 Stat. at 845, with Alexander Holtzoff, *Proposed Federal Tort Claims Bill* § 4(2) (1931) [hereinafter "Holtzoff Bill"].

3. Judge Holtzoff's materials, like the text of § 2680(c) itself, demonstrate that the provision was developed to provide a limited exception to the FTCA that would address the business of assessing customs duties and taxes while accounting for other acts and other actors necessary to carry out such business. In apparent recognition that the detention of property was often necessarily incidental to the assessment of duties and taxes, see, *e.g.*, *Boyd v. United States*, 116 U.S. 616, 623 (1886) ("[T]he seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them * * * ha[s] been authorized by our own revenue acts from the commencement of the government."); see also *A-Mark*, 593 F.2d at 850-51 (Tang, J., concurring) (noting that "[t]he governmental function of assessing and collecting customs duties necessarily requires some period of detention when the imported item is inspected for purposes of evaluation" and that "[a] similar situation often arises when property must be levied against for tax purposes"), Judge Holtzoff explained in the report accompanying his draft bill that he "expanded the exception so as to include immunity from liability in respect of loss in

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they were "brought to the attention of the Congressmen considering the bill." *Kosak*, 465 U.S. at 857 n.13. Congress never considered a bill with the detention of property clause until it took up H.R. 5065, which was drafted by the Department of Justice and General Accounting Office and introduced just a few months after Judge Holtzoff drafted his bill and accompanying report.

connection with the detention of goods or merchandise by an officer of customs or excise." Holtzoff Report, *supra*, at 16 (discussing Holtzoff Bill, *supra*, § 4(2)).

Although he immediately thereafter elaborated that this "additional proviso has special reference to the detention of imported goods in appraisers' warehouses or customs houses, as well as seizures by law enforcement officials, internal revenue officers, and the like," nowhere did he indicate that he designed the additional proviso to "include immunity" from property torts by law enforcement officers acting outside the customs or tax contexts. *Ibid.* Had he so intended, one would expect that he would have said so explicitly. His reference to "other law enforcement officers, internal revenue officers, and the like" immediately following his reference to "appraisers' warehouses or customs houses" is best understood as his way of explaining that the exception turned on the acts in which "other law enforcement officers, internal revenue officers, and the like" might be engaged – specifically, the detention of property while enforcing customs and tax laws. *Ibid.*; see also *A-Mark*, 593 F.2d at 851 (Tang, J., concurring) (arguing that the "any other law-enforcement officer" phrase included by Congress in what is now § 2680(c) "should be viewed as Congress's recognition of the fact that federal officers, other than customs and excise officers, sometimes become involved in the activity of detaining goods for tax or customs purposes"); contrast *Ysasi*, 856 F.2d at 1524 (stating, without explanation, that "a broad reading of the section comports with [Judge Holtzoff's] report").

Lest there be any doubt, Judge Holtzoff's confessed inspiration for the proviso is "even more explicit" that immunity should be preserved for only the activities of law enforcement officers acting in a customs or tax capacity. *Kosak*, 465 U.S. at 856 n.12. As Judge Holtzoff explained in his report, he gleaned the additional proviso from a proposed draft tort claim bill submitted by the Crown Proceedings Commission in England in 1927. See Holtzoff Report, *supra*,

at 16. The relevant section in the Report of the Crown Proceedings Committee reads as follows:

> No proceedings shall lie under this section * * * for or in respect of the loss of or any deterioration or damage occasioned to, or any delay in the release of, any goods or merchandise by reason of anything done or omitted to be done by *any officer of customs and excise acting as such.*

Report of Crown Proceedings Comm., Cmd. 2842, § 11(5)(c), at 17-18 (Apr. 1927) (Eng.) (emphasis added).[24] Nothing in it suggests that the activities of law enforcement officers acting outside the customs or tax contexts would be immunized.

4. After Congress failed to enact H.R. 5065, it considered various other tort claim bills over the next fifteen years. Judge Holtzoff's proposed exception containing the phrase "detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer" was reintroduced repeatedly and without change[25] until it was finally enacted in 1946. See LRA § 421(c), 60 Stat. at 845.

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[24] For some reason, the detention of goods proposal in the British bill was never enacted into law in Great Britain. See *Kosak*, 465 U.S. at 856 n.12; Crown Proceedings Act, 1947, 10 & 11 Geo. 6, ch. 44 (Eng.).

[25] See S. 211, 72d Cong., 1st Sess. § 206(2) (1931); S. 4567, 72d Cong., 1st Sess. § 206(2) (1932); H.R. 129, 73d Cong., 1st Sess. § 6(2) (1933); S. 1833, 73d Cong., 1st Sess. § 206(2) (1933); H.R. 2028, 74th Cong., 1st Sess. § 6(2) (1935); S. 1043, 74th Cong., 1st Sess. §206(2) (1935); S. 2690, 76th Cong., 1st Sess. § 303(2) (1939); H.R. 7236, 76th Cong., 3d Sess. § 303(2) (1940); H.R. 5299, 77th Cong., 1st Sess. § 303(2) (1941); H.R. 5373, 77th Cong., 1st Sess. § 303(2) (1941); S. 2207, 77th Cong., 2d Sess. § 402(3) (1942); S. 2221, 77th Cong., 2d Sess. § 402(3) (1942); H.R. 6463, 77th Cong., 2d Sess. § 402(3) (1942); H.R. 817, 78th Cong., 1st Sess. § 303(2) (1942); H.R. 1356, 78th Cong., 1st Sess. § 402(3) (1943); S. 1114, 78th Cong., 1st Sess. § 402(3) (1943); H.R. 181, 79th Cong., 1st Sess. § 402(3) (1945); S. 2177, *supra*, § 421(c).

Over this period, Congress discussed what is now § 2680(c) on numerous occasions. It never mentioned that this language could – let alone should – be construed broadly to apply to all law enforcement officers in all contexts. Instead, Congress continuously referred to the exception as one dealing solely with customs and tax enforcement functions.[26] "If Congress had intended the exception to extend to detentions by 'any law-enforcement officer' outside the area of tax or customs, one would expect a more encompassing explanation," *A-Mark*, 593 F.2d at 851 (Tang, J., concurring) (observing that Senate Report 1400 "speaks of the detention of goods only by customs officers"); see also *Kurinsky*, 33 F.3d at 598 (observing that Senate Report 1400 "makes no mention whatsoever of an exemption for any and all seizures by law enforcement officers"); *Formula One*, 777 F.2d at 825 (Oakes, J., concurring) (noting the failure of the House Judiciary Committee in House Report 1287 to mention an exemption for detentions of property by law enforcement officers acting outside the areas of customs or tax), or at minimum, some debate about whether it would reach such activities. There was neither.

Even the Department of Justice, which was invited by Congress to analyze subsequent tort claim bills, characterized what is now § 2680(c) as applying to only "claims arising out of * * * the assessment or collection of taxes or duties

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[26] See H.R. Rep. No. 2428, 76th Cong., 3d Sess. 5 (1940) (providing that the statute would "except from the operation of the act * * * claims arising in connection with * * * the collection of taxes"); S. Rep. No. 1196, 77th Cong., 2d Sess. 7 (1942) ("These exceptions cover claims arising out of * * * the assessment or collection of taxes or assessments [and] the detention of goods by customs officers."); H.R. Rep. No. 2245, 77th Cong., 2d Sess. 10 (1942) (same); H.R. Rep. No. 1287, *supra*, at 6 (same); S. Rep. No. 1400, 79th Cong., 2d Sess. 33 (1946) (same); Joint Comm. on the Organization of Cong., *Explanation of the Legislative Reorganization Act of 1946*, 79th Cong., 2d Sess. 38 (Comm. Print 1946) [hereinafter "LRA Explanation"] (same).

* * * [and] the detention of goods by customs officers." *Tort Claims: Hearing on H.R. 5373 and H.R. 6463 Before the H. Judiciary Comm.*, 77th Cong., 2d Sess. 28, 33 (1942) [hereinafter "1942 Hearing"] (statement of Francis M. Shea, Asst. Att'y Gen.). Noticeably absent from the Department's explanation is any statement that the exception was intended to extend – or that its text extends – to detentions by "any law-enforcement officer" outside the area of customs or tax.[27] Had the Department, as the agency that drafted the exception, see U.S. *Kosak* Br. at 20 ("[The Department of Justice added the detention of property clause."), believed that what is now § 2680(c) was intended to reach so broadly, it surely would have characterized the exception's language as such or proposed new language. It did neither.

What is now § 2680(c) was first crafted to address claims arising out of customs and tax assessments. Judge Holtzoff then expanded the exception to include claims arising out of property detentions ancillary to those assessments by any law enforcement officers who might be involved, and Congress enacted his language without change. Nothing in Judge Holtzoff's materials or anything else in the legislative history of the FTCA even suggests that Judge Holtzoff, the Department of Justice, or Congress intended what is now § 2680(c) to sweep so broadly as to cover property claims arising out of all detentions or that Congress contemplated the exclusion of claims like petitioner's under the exception.

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[27] Likewise, bar associations consulted by Congress on draft tort claim bills never interpreted this language to apply to all law enforcement officers regardless of context. See, *e.g.*, *Tort Claims Against the United States: Hearing on H.R. 7236 Before Subcomm. No. 1 of the H. Judiciary Comm.*, 76th Cong., 3d Sess. 9 (1940) (report of the Chicago Bar Assn. Comm. on Fed. Legislation) ("The provisions of the act are not to apply * * * to claims arising out of the * * * assessment or collection of taxes or customs duties.").

III. THE CONGRESSIONAL PURPOSE BEHIND § 2680(C) CONFIRMS THAT CONGRESS DID NOT INTEND TO BAR CLAIMS ARISING FROM DETENTIONS OF PROPERTY OUTSIDE THE CUSTOMS AND TAX CONTEXTS

The purpose behind Congress' enactment of § 2680(c) – like the exception's text and legislative history – confirms that Congress intended the exception to exclude claims arising from detentions of property by only officers engaged in customs and tax activities. The "rationale underlying § 2680(c)'s exception in the context of customs and excise functions does not justify a reading which would extend the coverage of the exception to all other law enforcement officers." *Ortloff*, 335 F.3d at 659. Rather, the limited nature of the exception as originally conceived stems from Congress' recognition of the availability of other means by which the government would compensate plaintiffs for customs and tax officers' negligent handling of their property and Congress' concomitant desire to avoid creating a redundant remedy.

1. Prior to the FTCA's enactment, the United States' sovereign immunity barred suits against it for the negligent acts or omissions of its employees. As a result, those seeking compensation directly from the United States for such negligent acts had to bring their claims to Congress, which would investigate, adjudicate, and settle the claims through private legislation. See *United States v. Muniz*, 374 U.S. 150, 154 (1963). The "mass of claims," however, placed a "substantial" burden on Congress. *Ibid.*[28] Relief from the burdens of that "notoriously clumsy" private bill system, *Dalehite*, 346 U.S. at 25, so that Congress could instead "devote more time to major public issues" was, as the Court has

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[28] The data surveyed by the Court in *Dalehite* shows that, over the two decades that Congress considered tort claim legislation, between approximately 1,600 and 2,300 private claim bills were introduced in *each* Congress. 346 U.S. at 25 n.9.

observed, Congress' "overwhelming purpose" for the Act, *Yellow Cab*, 340 U.S. at 549-50.[29]

At the same time, the Act "avoid[ed] injustice to those having meritorious claims hitherto barred by sovereign im-

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[29] The legislative history confirms that Congress' overarching purpose for the FTCA was to curtail the private bill system. The 79th Congress that enacted the FTCA repeatedly expressed concerns that the private bill system was "unduly burdensome to the Congress and * * * unjust to the claimants." H.R. Rep. No. 1287, *supra*, at 3; accord, LRA Explanation, *supra*, at 35; S. Rep. No. 1400, *supra*, at 30; see also S. Rep. No. 1011, 79th Cong., 2d Sess. 24-25 (1946) ("Congress is poorly equipped to serve as a judicial tribunal for the settlement of private claims against the Government of the United States. This method of handling individual claims does not work well for either the Government or for the individual claimant.").

Earlier Congresses, reaching back as far as when tort claim legislation was first proposed in the 69th Congress, expressed identical sentiments. See H.R. Rep. No. 206, 69th Cong., 1st Sess. 1-3, 8-14 (1926); H.R. Rep. No. 667, 69th Cong., 1st Sess. 1-3, 8-14 (1926); S. Rep. No. 14, 69th Cong. 1st Sess. 2, 7 (1926); H.R. Rep. No. 286, 70th Cong., 1st Sess. 1-3 (1928); H.R. Rep. No. 1699, 70th Cong., 2d Sess. 3-4 (1929); S. Rep. No. 766, 71st Cong., 2d Sess. 1-2 (1930); H.R. Rep. No. 2800, 71st Cong., 3d Sess. 2-8 (1931); S. Rep. No. 658, 72d Cong., 1st Sess. 2, 4 (1932); H.R. Rep. No. 2428, *supra*, at 2; S. Rep. No. 1196, *supra*, at 5; H.R. Rep. No. 2245, *supra*, at 5-6; 1942 Hearing, *supra*, at 49-55 (collecting criticisms of the private bill system). So too did the Executive – both President Roosevelt himself and the Department of Justice. See H.R. Doc. No. 562, 77th Cong., 2d Sess. 1-2 (1942) (message dated Jan. 14, 1942, from President Roosevelt) (asserting that tort claim legislation "would be of real assistance to the Congress and to the President at a time when matters of grave national importance demand an ever-increasing share of our attention"); Department of Justice, *Tort Claims Against the United States: An Analysis of S. 2221*, 77th Cong., 2d Sess. 3 (Comm. Print 1942) [hereinafter "1942 DOJ Analysis"] ("By removing a large number of private tort claims from Congress and the Claims Committees, it will give the National Legislature more time to devote to matters of wider importance, and will thereby benefit the public as well as claimants and Members of Congress.").

munity," *Muniz*, 374 U.S. at 154, by "affording * * * easy and simple access to the federal courts for torts within [the Act's] scope," *Dalehite*, 346 U.S. at 25. Notwithstanding Congress' "feeling that the Government should assume the obligation to pay damages for the misfeasance of employees carrying out its work," there were certain classes of claims for which the FTCA's waiver of sovereign immunity was either undesirable or unnecessary. *Ibid.* Congress' enactment of the thirteen § 2680 exceptions was the resulting accommodation.

2. In *Kosak*, the Court identified three "general purposes" behind Congress' preservation of sovereign immunity through the thirteen § 2680 exceptions: (1) "ensuring that 'certain governmental activities' not be disrupted by the threat of damage suits;" (2) "avoiding exposure of the United States to liability for excessive or fraudulent claims;" and (3) not "extending the coverage of the Act to suits for which adequate remedies were already available." 465 U.S. at 858 & n.17. Of particular relevance here, the Court has repeatedly suggested that Congress' "*only* arguably relevant" purpose for enacting *§ 2680(c)* was to avoid "extending the coverage of the Act to suits for which adequate remedies were already available."[30] *Kosak*, 465 U.S. at 858 & n.17 (emphasis

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[30] The FTCA's legislative history reinforces that the three "general purposes" underlying the § 2680 exceptions are alternative, such that only one will often support a particular exception. See LRA Explanation, *supra*, at 38 (providing that the exceptions were designed to "cover claims which relate to certain governmental activities which should be free from the threat of damage suit, *or* for which adequate remedies are already available" (emphasis added)); S. Rep. No. 1400, *supra*, at 33 (same); H.R. Rep. No. 1287, *supra*, at 6 (same); S. Rep. No. 1196, *supra*, at 7 (same); H.R. Rep. No. 2245, *supra*, at 10 (same). Even the Department of Justice understood the purposes for the § 2680 exceptions to be alternative. See 1942 DOJ Analysis, *supra*, at 2 (providing that the exceptions "relate to certain governmental activities which should be free from the restraint of damage suits, *or* in respect of which adequate remedies are already available" (emphasis

added); see also *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 427 n.5 (1995) (listing § 2680(c) among those FTCA exceptions that "are for cases in which other compensatory regimes afforded relief"); *Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 462 n.4 (1980) (*per curiam*) ("[T]he purpose of § 2680(c) was to avoid duplication; there was no indication that existing remedies, if any, were withdrawn.").[31]

3. The FTCA's legislative history supports the Court's repeated suggestion that Congress enacted § 2680(c) with only the third general purpose – to avoid creating a duplicative remedy – in mind. There is nothing in the Act's legislative history to the contrary.

With respect to early tort claim bills, which contained a customs and tax exception for only "claim[s] arising in respect of the assessment or collection of any tax or customs duty" (see page 26, *supra*), Congress repeatedly observed

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added)); 1942 Hearing, *supra*, at 33 (testimony of Francis M. Shea, Asst. Att'y Gen.) (same).

[31] Commentators who analyzed the FTCA shortly after its enactment likewise agreed that what is now § 2680(c) was enacted to avoid creating a duplicative remedy. See Walter Gellhorn & C. Newton Schenck, *Tort Actions Against the Federal Government*, 47 Colum. L. Rev. 722, 730 (1947) (listing LRA § 421(c) among exceptions "relat[ing] to types of claims for which other legislative provision has been made"); Irvin M. Gottlieb, *The Federal Tort Claims Act – A Statutory Interpretation*, 35 Geo. L. Rev. 1, 45 (1946) ("The basis for the exception of Section 421(c) lies in the existence of an adequate, subsisting remedy upon which suits against the United States have heretofore been entertained. Its specific enumeration serves to avoid ambiguity, especially in view of the courts allowing suit for recovery of duties wrongfully and tortiously assessed, and for income taxes which had been wrongfully assessed."); Yale L. J. Note, *supra*, at 547 (listing LRA § 421(c) among exceptions enacted "because of satisfactory provisions already made for handling the claims covered"); see also 2 Jayson & Longstreth, *supra*, § 13.02, at 13-8 (explaining that "Congress was satisfied that 'adequate remedies are already available' for claims" covered by what is now § 2680(c)).

that the exception was designed "to exclude * * * certain classes of claims for which satisfactory relief is available under existing law." H.R. Rep. No. 206, *supra*, at 4; H.R. Rep. No. 667, *supra*, at 4 (same); H.R. Rep. No. 286, *supra*, at 4; H.R. Rep. No. 2800, *supra*, at 9 (reporting that "settlements are provided by other statutes" for claims arising out of "[t]he assessment or collection of any tax or customs duty").

Even after Congress began to consider tort claim bills containing Judge Holtzoff's "expanded" customs and tax exception, the explanation of the exception's purpose remained constant. Col. O.R. McGuire, Counsel to the General Accounting Office of the Comptroller General, testified before a subcommittee of the House Claims Committee that injuries covered by the "expanded" exception were already "taken care of under the taxation and customs laws, and the Government does not want to provide for a tort action in those instances, because there is a civil action that would take care of the situation to a large extent." 1932 Hearing, *supra*, at 18 (testimony of Col. O.R. McGuire, Counsel to the General Accounting Office of the Comptroller General) (discussing H.R. 5065, *supra*, § 206(2)).[32] Similarly, Judge Holtzoff himself, in testimony before a subcommittee of the Senate Judiciary Committee, identified[33] the existence of other remedies as the only reason for the exception. See *Tort Claims Against the United States: Hearing on S. 2690 Before a Sub-*

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[32] Col. McGuire's testimony, as counsel to the Comptroller General, was highly relevant because, as already explained (page 26 & note 23, *supra*), H.R. 5065 represented a composite of the views of the Department of Justice and the General Accounting Office of the Comptroller General. Although his reference to an existing civil action was not specific, it was likely to the traditional common law remedy against individual customs and tax officers. See pages 39-45, *infra*.

[33] As already explained (pages 27-28, *supra*), the Court has given "significant" weight to Judge Holtzoff's interpretations of what is now § 2680(c).

comm. of the S. Judiciary Comm., 76th Cong., 3d Sess. 38 (1940) [hereinafter "1940 Senate Hearing"] (testimony of Alexander Holtzoff, Special Asst. to the Att'y Gen.) (discussing S. 2690, *supra*, § 303(2)).[34] Although Col. McGuire's and Judge Holtzoff's testimony are the only two statements of purpose for the "expanded" exception enacted by Congress, nobody – not Judge Holtzoff, Col. McGuire, any other witness, or any Member of Congress – articulated any contrary purpose.

The one-sidedness of the customs and tax exception's legislative history, both before and after Judge Holtzoff expanded the exception, fully supports the Court's repeated suggestion that Congress' "only arguably relevant" purpose for enacting it was to avoid "extending the coverage of the Act to suits for which adequate remedies were already available."[35]

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[34] In his analysis of S. 2690's "expanded" customs and tax exception, Judge Holtzoff testified that "various tax laws" already "provid[ed] the machinery for recovering back any tax that has been paid but was not properly owing" and that "[t]here was no purpose in interfering with that machinery." 1940 Senate Hearing, *supra*, at 38. The Court was, of course, correct when it observed in *Kosak*, that Judge Holtzoff "emphasized the adequacy of existing remedies as a justification for the portion of the provision pertaining to the recovery of improperly collected taxes [but] did not proffer an explanation for the portion of the provision pertaining to the detention of goods." 465 U.S. at 858 n.17. This does not detract, however, from the fact that *every* statement of purpose for enacting the customs and tax exception in the FTCA's entire legislative history stressed exclusively the existence of other remedies.

[35] To be sure, the Court in *Kosak*, considered each of the three "general purposes" underlying Congress' enactment of the § 2680 exceptions. 465 U.S. at 858 n.16. But it did so "merely to ensure that [its] construction [was] not undercut by any indication that Congress meant the exception" to be applied differently – not because each must apply to § 2680(c). *Ibid.*; cf. *id.* at 865-66, 869 (Stevens, J., dissenting) (criticizing the United States' reliance on and questioning the relevance of the other two "general purposes" behind certain § 2680

4. Congress was undoubtedly aware of – indeed, repeatedly enacted statutes assuming – the availability of common law suits against revenue collectors and other officers engaged in customs and tax activities but not law enforcement officers generally. Such suits are likely what Congress considered to be the "adequate remedies * * * already available," *Kosak*, 465 U.S. at 858, when, in an effort to avoid creating a duplicative remedy, it enacted § 2680(c). See pages 35-38, *supra*.

As the Court observed in *Kosak*, "[a]t common law, a property owner had (and retains) a right to bring suit against an individual customs official who negligently damaged his goods." 465 U.S. at 860; see also *States Marine Lines, Inc. v. Schultz*, 498 F.2d 1146, 1149 (CA4 1974) (allowing common law claim for damages against individual customs officers resulting from their detention of goods); *Dioguardi v. Durning*, 139 F.2d 774, 775 (CA2 1944) (same). The same is true with respect to tax collectors. Both customs and tax collectors were, at common law, considered "quasi-bailees" of property detained for violations of the revenue laws.[36] See Joseph Story, *Commentaries on the Law of Bailments* §§ 613, 618, at 623, 625 (8th ed. 1870).

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exceptions); *Dolan*, 126 S. Ct. at 1258-59 (rejecting the United States' arguments as to how a broad construction of § 2680(b) is best served by resort to the other two "general purposes"). Whatever the relevance of Congress' other two "general purposes" to the issue before the Court in this case, they are appropriately served by the narrow construction of § 2680(c) advanced by petitioner, which is faithful to Congress' decision to leave in place the traditional (and more restrictive) common law remedy for property damage by customs and tax officials. See note 38, *infra*.

[36] Since the earliest days of the Republic, Congress has assumed that revenue collectors were quasi-bailees of the property they seize. As early as 1799, Congress provided that if, in a forfeiture proceeding, judgment is entered for the claimant, the seized property must be returned by the collector "forthwith." Act of Mar. 2, 1799, ch. 22, § 89, 1 Stat. 627, 695. This recognition of revenue collectors' quasi-bailee

If property was properly seized by the collector and forfeited to the government, the claimant was not, of course, entitled to its return. But if the property was not forfeited, revenue collectors could be held "liable in their individual capacities for tortious conduct committed in the performance of their duties," including the loss of or damage to non-forfeited property. *States Marine Lines*, 498 F.2d at 1149. Specifically, if the underlying seizure of property was "without a justifiable cause," the collector could be held strictly liable "for all loses and damages" under a theory of conversion or trespass. Story, *supra*, § 613, at 625. In such a case, the collector may even be personally liable for consequential damages arising out of the seizure. See *Agnew v. Haymes*, 141 F. 631, 641 (CA4 1905). If the seizure was justifiable (albeit ultimately held to have been erroneous), the collector's liability was limited under a negligence theory for breach of the "official obligation, as imposed by law," to exercise "reasonable diligence" in the performance of the duties of office. *United States v. Thomas*, 82 U.S. (15 Wall.) 337, 342-343 (1873); see also Story, *supra*, § 613, at 625 (observing that "[i]f the seizure is for a justifiable cause, [revenue officers] are responsible only for losses and damages occasioned by the want of ordinary diligence"); *Agnew*, 141 F.3d at 641.

5. Two sets of protective enactments designed to remedy the unjust result of collectors being personally liable for carrying out their official duties demonstrate Congress' awareness of the availability of (and comfort with) the common law suit against individual customs and tax officers. First, in 1815, Congress adopted a statute allowing "any collector, naval officer, surveyor, inspector, or any other officer, civil, or military" sued in state court for "any thing done, or omitted to be done as an officer of customs" to remove the

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status was in effect when the FTCA was enacted and remains in effect today. See 28 U.S.C. 818 (1940) (now codified as amended at 28 U.S.C. 2465).

case to federal court. Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 195, 198. Congress then expanded the protection in 1866 to allow removal by officers acting under the internal revenue laws. See Act of July 13, 1866, ch. 184, § 67, 14 Stat. 98, 171 (extending the removal protection to "any officer of the United States" sued "on account of any act done" under the internal revenue laws).[37] About the same time, Congress entitled any "collectors or other officers of the revenue" sued for "any act done by them" to indemnification by the Treasury, so long as a federal court certified that the collector had acted either with probable cause or "under the directions of the Secretary of the Treasury or other proper officer of the government." Act of Mar. 3, 1863, ch. 76, § 12, 12 Stat. 737, 741. As the Court has recognized, this removal and indemnification process effectively "convert[ed] the suit against the collector into a suit against the government." *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 381 (1933) (Cardozo, J.) (citing *United States v. Sherman*, 98 U.S. (8 Otto) 565, 567 (1878)); see also *Andrews*, 441 F.3d at 225 ("The effect of this statutory indemnification is to skirt the United States' sovereign immunity by providing a back-door entry to the federal fisc to obtain monetary damages: the historical suit is against a tax or customs officer, but the United States pays the judgment.").

This framework was in place when Congress enacted the FTCA in 1946 and remains in place today. See 28 U.S.C. 76 (1940) (removal provision) (now codified as amended at 28 U.S.C. 1442(a)(1)); 28 U.S.C. 842 (1940) (indemnification provision) (now codified as amended at 28 U.S.C. 2006). Thus, when Congress exempted from the FTCA claims "arising in respect of * * * the detention of any goods or merchandise by

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[37] For a discussion of these early removal statutes, see *Tennessee v. Davis*, 100 U.S. (10 Otto) 257, 167-69 (1879), and *City of Philadelphia v. The Collector*, 72 U.S. (5 Wall.) 720, 728-29 (1867).

any officer of customs or excise or any other law enforcement officer," LRA § 421(c), 60 Stat. at 845, tort plaintiffs

> already had another way to recover from the government for the actions of customs officers, tax officers, and other officers acting under the customs and tax laws. Those plaintiffs did not need the waiver of sovereign immunity provided by the FTCA. For them, "adequate remedies" were "already available."

Bazuaye, 83 F.3d at 485.

But, as the D.C. Circuit aptly observed, "[t]he same could not be said for plaintiffs injured by federal law-enforcement officers acting outside the authority of the customs and tax laws." *Ibid.* The indemnification procedure was available only to "*a collector or other revenue officer*" acting "under the directions of the Secretary of the Treasury or other proper officer of the Government" – in other words, customs and tax collectors and other officers acting in a customs or tax capacity. 28 U.S.C. 842 (1940) (emphasis added) (now codified as amended at 28 U.S.C. 2006).

> No federal statute indemnified federal officers for actions taken outside the customs and tax contexts. Plaintiffs injured by such actions could not recover from the government indirectly through a fictional "personal" suit against the individual officer, and the sovereign immunity of the United States barred them from recovering in a suit against the government itself. Unlike plaintiffs injured by officers acting under the tax and customs laws, then, plaintiffs injured by federal officers acting in general law-enforcement capacities had no way to recover in a suit against the government itself.

Bazuaye, 83 F.3d at 485-86 (footnote omitted); see also *Andrews*, 441 F.3d at 225 ("[A]t the time of the FTCA's enactment, plaintiffs enjoyed no similar right to sue law enforce-

ment officers acting outside a customs or tax enforcement capacity.").[38]

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[38] As already explained, the relevance to this case of Congress' other two "general purposes" for enacting the § 2680 exceptions is dubious. See pages 33 & 35-38, *supra*. But whatever their relevance, they are appropriately served by the narrow construction of § 2680(c) advanced by petitioner.

The assessment and collection of duties and taxes is "the life-blood of government, and their prompt and certain availability an imperious need." *Bull v. United States*, 295 U.S. 247, 259 (1935); see also *West India Oil Co. v. Domenech*, 311 U.S. 20, 25 (1940) (stressing the "importance in the administration of the customs laws of the United States and of the revenue laws"). Indeed, over the twenty years that Congress considered tort claim legislation, between 88% and 98% of the federal government's annual revenue came from taxes and customs duties. See U.S. Bureau of Census, *Historical Statistics of the United States: Colonial Times to 1970*, at 1122 (1976). It is precisely because of the paramount importance of such revenue collection functions that revenue officers have, "[s]ince the founding of our Republic," been allowed to search and seize property without a warrant or probable cause. *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985); see also *Bull*, 295 U.S. at 259.

The narrow context-based construction of § 2680(c) offered by petitioner does nothing to threaten these "life-blood" governmental functions. As the Court recognized in *Kosak*, "there are significant limitations to the common-law remedy" that Congress preserved for suits against customs and tax officers. 465 U.S. at 860. "The most important" of these limitations is the "requirement that the plaintiff prove negligence on the part of a particular customs official" because "[s]uch proof will often be difficult to come by" and, thereby, limit the number of suits filed and the prospect of a plaintiff's recovery. *Id.* at 860-61. Suits under the FTCA, in contrast, require the plaintiff to demonstrate negligence on the part of the government *en masse*, which is necessarily less demanding. Thus, by allowing claims against customs and tax officers and other law enforcement officers acting in revenue collection capacities to continue under the more restrictive common-law mechanism instead of the FTCA, Congress appropriately shielded the important governmental "power to detain goods owned by suspected violators" of customs and tax laws from "disrupt[ion] by the threat of damage suits" and "exposure * * * for excessive or

Accordingly, including federal officers acting in general law-enforcement capacities (like respondents) within the reach of § 2680(c) would, "at the time of the FTCA's enactment, not have denied plaintiffs a duplicate remedy, but rather would have denied them any remedy at all,"[39] *Andrews*, 441 F.3d at 225, and "swallow up Congress' waiver of sovereign immunity, given the potential number of law en-

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fraudulent claims." *Kosak*, 465 U.S. at 858-59; see also *id.* at 861 n.24 (positing that "Congress may well have feared that the creation of a remedy under the [FTCA] would have increased the liability of the United States to such a degree as to curtail the exercise by the [customs and revenue] service[s] of [their] authority to detain goods").

[39] Since 1922, Congress has authorized agency heads to settle, for not more than $1000, claims involving the negligence of governmental employees. See Act of Dec. 28, 1922, ch. 17, § 2, 42 Stat. 1066 (codified as amended at 31 U.S.C. 3723). This administrative settlement applies to loss of a prisoner's property by the negligence of a BOP officer, see 31 U.S.C. 3723 (allowing "[t]he head of an agency" to "settle a claim * * * for damage to, or loss of, privately owned property * * * caused by the negligence of an officer or employee of the United States Government"), but it does not allow a judicial suit and provides only limited recovery. Accordingly, it has never been considered duplicative of the remedy available through the FTCA. See *Dolan*, 126 S. Ct. at 1259 (rejecting the government's argument that administrative remedies "permit[ting] only discretionary relief" are duplicative of FTCA remedies); see also *Bazuaye*, 83 F.3d at 486 n.3. While other statutory or judicially-created remedies "may *now* exist" for certain plaintiffs like petitioner, there were no such other remedies in existence at the time of the FTCA's enactment through which they could receive payment from the federal fisc. *Andrews*, 441 F.3d at 225 n.5 (emphasis added); see also Sarah Lahlou-Amine, Note, *The Improper Expansion of Law Enforcement Officers' Immunity Under the Federal Tort Claims Act Detention of Property Provision: Why Immunity Should Not Extend to Bureau of Prisons Officials*, 35 Stetson L. Rev. 559, 564-68 (2006) (noting the unavailability of other remedies); cf. *Carlson*, 446 U.S. at 19-20 (holding that FTCA and *Bivens* remedies were "parallel, complementary causes of action," such that the availability of the former did not preempt the latter, but observing that the FTCA was "was enacted long before *Bivens* was decided").

forcement officials in our modern government's alphabet soup," *Ortloff*, 335 F.3d at 659.

6. Finally, leaving no remedy to individuals whose property was detained and subsequently lost or damaged by federal officers acting in general law enforcement capacities would subvert the purpose of the FTCA as whole, which as already discussed (pages 33-34, *supra*), was to transfer the responsibility for adjudicating and settling tort claims from congressional claims committees to the judiciary. Where an adequate pre-existing remedy was available, such as a common law suit against an individual customs or tax officer, Congress was unlikely to be burdened by a private claim bill. The same is true for classes of claims not barred by one of the § 2680 exceptions and, therefore, actionable under the Act. But where neither remedy was available, Congress would be (and remains today) the only forum for relief. See, *e.g.*, H.R. Rep. No. 188, 102d Cong., 1st Sess. (1991) (recommending passage of a private claim bill to compensate boat owner for damage by customs officers because barred by § 2680(c)). The broad reading of § 2680(c) advanced by the court of appeals below leaves plaintiffs with claims arising out of the detentions of property by law enforcement officers acting outside the customs and tax contexts with neither remedy and, therefore, returns Congress to the precise peril that it sought to avoid.[40]

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[40] The Court has already observed that, in seeking to alleviate the burdens of private claim bills, Congress was "well aware of" the "large[] number of private bills" introduced on behalf of federal prisoners (like petitioner), which "were * * * among those adding to Congress' burdens." *Muniz*, 374 U.S. at 153-54. In light of Congress' overarching purpose for enacting the FTCA, it would have been strange for Congress to enact simultaneously a detention of property exception that precluded the transfer of federal prisoner claims to the judiciary.

IV. THE CIVIL FORFEITURE-FOCUSED AMENDMENTS TO § 2680(C) IN 2000 ARE IRRELEVANT TO THIS CASE

In 2000, Congress amended § 2680(c) through its enactment of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. No. 106-185, 114 Stat. 202. The amendment added to the end of § 2680(c)'s original language the following:

> except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—
>
> (1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;
>
> (2) the interest of the claimant was not forfeited;
>
> (3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and
>
> (4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

CAFRA § 3(a)(3), 114 Stat. at 211. This new clause created an "exception to the exception" by waiving the United States' sovereign immunity for a subset of previously barred property claims arising in connection with asset forfeitures.[41]

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[41] CAFRA also altered the original language of § 2680(c). The amendment struck the words "any goods or merchandise" and replaced them with the words "any goods, merchandise, or other property." CAFRA § 3(a)(1), 114 Stat. at 211. Why Congress did so is un-

The language added to the statute through this amendment plainly has no application to petitioner because his property was not detained "for the purpose of forfeiture." 28 U.S.C. 2680(c)(1). The viability of petitioner's claim, therefore, depends (as it would if CAFRA had never been enacted) exclusively on the meaning of the phrase "any other law enforcement officer" in § 2680(c)'s detention of property clause, which is original to the FTCA's 1946 enactment.[42] See *Dahler v. United States*, 473 F.3d 769, 772

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clear, although it was likely to remedy the fact that neither real property nor currency are "goods or merchandise." See *Black's Law Dictionary*, *supra*, at 714 (defining "goods" as "[t]angible or movable personal property other than money"); *id.* at 1008 (defining "merchandise" as "a movable object" and noting that the definition "generally excludes * * * real estate" and "does not apply to money"). Whatever Congress' reason, respondents cannot possibly suggest that the amendment evinces an intention to broaden the class of law enforcement officers to which § 2680(c)'s detention clause applies. Customs and tax officers have long been able to detain and seize real property and currency. See 26 U.S.C. 7608(a)(4) (authorizing internal revenue enforcement officers to "make seizures of property subject to forfeiture"); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43 (1993) (seizure of home by customs officers); *United States v. $8,850*, 461 U.S. 555 (1983) (seizure of currency by customs officers). The addition of "other property" to the end of the detention clause appears to simply recognize that long-established authority.

[42] While Congress was crafting CAFRA, it had a chance to expressly adopt a construction of § 2680(c)'s detention of property clause that would bar petitioner's claim, but it declined to do so. After the Sixth Circuit issued its decision in *Kurinsky*, 33 F.3d at 598, which was the first appellate decision to adopt the narrow construction of the detention-clause, the Department of Justice quickly set out to have Congress abrogate it. In a bill drafted by the Department and transmitted to Speaker Gingrich, the Department urged Congress to amend the detention clause to bar claims "arising in respect of the * * * detention of any goods or merchandise, or other property *by any law enforcement officer performing any official law enforcement function*." *Civil Asset Forfeiture Reform Act: Hearing on H.R. 1916 Before the H. Judiciary Comm.*, 104th Cong., 2d Sess. 51-52, 126-27 (1996)

(CA7 2007) (*per curiam*) ("The text of CAFRA says nothing about the type of activities in which law enforcement officers must be engaged in order for § 2680(c) *to initially apply and thus immunize the government from suit.*" (emphasis added)); see also *Andrews*, 441 F.3d at 226-27 & n.8 (refusing to construe § 2680(c)'s detention of property clause in light of CAFRA).

Respondents suggested at the petition stage that the CAFRA amendment may be relevant here because it "underscores [§ 2680(c)'s] breadth." Resp. Cert. Br. 6-7. That suggestion is misplaced. As the Court has repeatedly held, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Jefferson County Pharm. Ass'n v. Abbott Labs.*, 460 U.S. 150, 165 n.27 (1983) (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117, 118 n.13 (1980)); accord, *United States v. Price*, 361 U.S. 304, 313 (1960). Accordingly, "it is the intent of the Congress that enacted [the "any other law enforcement officer" phrase] * * * that controls." *International Bhd. of Teamsters*, 431 U.S. at 354 n.39; accord, *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979); see also *Mackey v. Lanier Collection Agency*, 486 U.S. 825, 839-40

(draft bill and accompanying "Section-by-Section" analysis) (emphasis added). After adding to it an express incorporation of § 2680(h)'s broad definition of "investigative or law enforcement officer," Representative Schumer introduced the bill as H.R. 1745, *supra*, § 106. Congress, of course, never enacted H.R. 1745, and instead opted to leave § 2680(c)'s "any other law enforcement officer" phrase unchanged. To the extent that the Court deems it appropriate to look to CAFRA or its legislative history at all, the most relevant evidence of Congress' intent is its failure to enact H.R. 1745, which indicates its desire to allow the narrow interpretation of § 2680(c) (such as the Sixth Circuit's in *Kurinsky*) to continue. See, *e.g.*, *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985) (finding significant "a refusal by Congress to overrule a[] construction of legislation * * * where the [] construction has been brought to Congress' attention through legislation specifically designed to supplant it").

(1988); *United Air Lines, Inc. v. McCann*, 434 U.S. 192, 200 n.7 (1977); *Andrews*, 441 F.3d at 227 n.8. As petitioner has demonstrated throughout this brief, § 2680(c)'s text, legislative history, and underlying purpose all evince that the Congresses that originally considered and the Congress that eventually enacted what is now § 2680(c) did not intend the provision to bar a claim like petitioner's.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

STATUTORY APPENDIX

1. 28 U.S.C. 1346(b)(1) provides:

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. 28 U.S.C. 2674 provides:

The United States shall be liable, respecting the pro visions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory dam ages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which other wise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section ap plies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been avail able to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

3. 28 U.S.C. 2680 provides:

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.[1]

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, ch. 1049, § 13(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

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[1] So in original.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(*l*) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.